

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

ALEXANDER LEVISON, LILLIE LEVISON  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

FILED

NOV 13 1917

F. D. MONCKTON,  
CLERK.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*In the Southern Division of the District Court of the  
United States for the Northern District of Cali-  
fornia, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**Complaint.**

The plaintiffs complain of the defendants, and allege as follows:

1.

The plaintiffs at all the times in this complaint mentioned were and they still are husband and wife, and they have been during more than six months last past and still are citizens of the State of Washington and inhabitants of and residents in the city of Seattle in the county of King, in the Northern Division of the Western District of said State of Washington.

2.

The defendants I. W. Bernstein, Alexander Levison, Lillie Levison, and Mary A. Ostroski at all the times in this complaint mentioned were and they still are citizens of the State of California and inhabitants of and residents in the city of San Francisco in the county of San Francisco in the Northern District of said State of California.

## 3.

The defendant National Surety Company at all the times in this complaint mentioned was and it still is a corporation duly created and existing under and by virtue of the laws of the State of New York, and having its principal place of business and home office in the city of New York in said State of New York; and by virtue of due compliance with the requirements of the [1\*] laws of the State of California in that regard said corporation was and still is entitled to transact business in said State of California, and to maintain, and was and is still maintaining, a branch office in the city of San Francisco in said State of California in charge of an official and agent of said corporation styled its Pacific Coast Manager, and is transacting business in said State of California through its said branch office; and by reason of the premises said National Surety Company is, for the purposes of jurisdiction of this action by this court, as well an inhabitant of and resident in said city of San Francisco in the county of San Francisco in the Northern District of said State of California, as of said city of New York in the State of New York.

## 4.

On or about July 21st, 1909, at said San Francisco, the defendants, wrongfully contriving and combining together to injure and harass the plaintiff, and unlawfully to coerce her into paying to the defendant Alexander Levison certain moneys which she did not owe and was not bound to pay to him, caused proceedings to be instituted against the plaintiff in the

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\*Page-number appearing at foot of page of original certified Transcript of Record.



police court of said city and county of San Francisco for her arrest and prosecution by the People of the State of California upon a charge of embezzlement of certain moneys in the sum of thirty-two dollars and fifty cents (\$32.50), the property of said Alexander Levison; and to that end the defendant I. W. Bernstein, at the instance and under the direction of each and all of his codefendants herein, appeared on said day before one E. P. Shortall, then a judge of said police court, and then and there made, signed, and before said judge made oath to a criminal complaint in and by which he charged, in substance and legal effect, that this plaintiff had committed the crime of embezzlement of said sum of \$32.50, the property of said Alexander Levison, while the same was in her hands as said Levison's clerk, agent and servant, and prayed that said accused [2] (this plaintiff) might be brought before a magistrate and dealt with according to law; and thereupon said police judge on said day issued and delivered to a police officer of said court a warrant for the arrest of this plaintiff upon said charge as set forth in said complaint, and said police officer thereupon, by authority of said warrant, on said day and at said city of San Francisco arrested this plaintiff and caused her to be confined under said warrant and arrest in the city jail of said city and county of San Francisco for the period of about three hours, at the expiration of which period the plaintiff gave bail for her appearance to said charge, as permitted by an indorsement on said warrant, and was thereupon released from confinement in said jail.

5.

On July 29th, 1909, this plaintiff was tried upon said charge in said police court, before said judge thereof and a jury, and at the conclusion of said trial she was acquitted of said charge by the verdict of said jury duly rendered, and thereupon she was discharged from custody by said police judge and her bail was exonerated.

6.

Said charge against this plaintiff was untrue in fact and in law, and said charge was by the defendants so as aforesaid made against this plaintiff, and said arrest, imprisonment and prosecution of this plaintiff thereon were by the defendants so as aforesaid made, procured, done, instituted and carried on, maliciously and without probable cause.

7.

By reason of the premises, and of said malicious and causeless acts of the defendants, this plaintiff was subjected to great humiliation, and suffered great mental anguish, and suffered in her reputation for honesty and integrity; to her damage in the sum of twenty-five thousand dollars (\$25,000). [3]

8.

Thereupon, and within nine months after said July 21st, 1909, the plaintiff instituted an action in the Superior Court of the State of California for the city and county of San Francisco, against all the defendants in this action as defendants in said action, for the recovery of her said damage by reason of said wrongful charge, arrest, imprisonment and trial, and filed her complaint

in said action and served the same, with a summons to said defendants to appear and defend said action, upon each of said defendants; and in said action all said defendants appeared and defended the same, and joined issues of fact upon the plaintiff's amended complaint therein; and such further proceedings were had in said action that on October 9th, 1911, the same was brought on for the trial of said issues therein and was tried before said Superior Court, which then and there had jurisdiction of the subject matter of said action and of the parties thereto; and at the conclusion of said trial, to wit, on October 17th, 1911, the Judge of said Superior Court presiding at said trial ordered that the plaintiff be nonsuited in said action, and entered a judgment of dismissal thereof upon said nonsuit. Thereupon the plaintiff appealed from said judgment to the Supreme Court of said State of California, and in due course said appeal was heard before said Supreme Court and by it taken under advisement, and finally, on the 26th day of July, 1916, said Supreme Court rendered and entered and filed its opinion and decision on said appeal, affirming said nonsuit and dismissal of said action by said Superior Court, and a judgment of affirmance thereof was accordingly rendered and entered by said Supreme Court in said action, on or shortly after said July 26th.

## 9.

Said nonsuit and judgment of dismissal of said action in said State courts were not and are not a bar to the prosecution and maintenance of another action by the plaintiff against the defendants [4] upon

the same cause of action on which said action in said State courts was based, in this court, which had and has concurrent jurisdiction with said State courts of said cause of action; but the pendency of said former action in said State courts prevented the plaintiff from bringing this action in this court until since said final disposition of said former action in said State Supreme Court.

WHEREFORE, the plaintiff demands judgment in her favor against the defendants for twenty-five thousand dollars, besides her costs herein.

THOMAS R. SHEPARD,

Plaintiff's Attorney.

Office address: 534 New York Bldg.,

Seattle, Washn.

United States of America,

Western District of Washington,—ss.

Emma C. Lee, being first duly sworn, deposes: I am the plaintiff in the within entitled action, and have read and am acquainted with the contents of the within and foregoing complaint therein, and I believe said complaint to be true.

EMMA C. LEE.

Subscribed and sworn to before me, this 16th day of October, 1916.

[Seal]

ALFRED E. HODGSON,

Notary Public in and for the State of Washington,  
Residing at Seattle.

[Endorsed]: Filed Nov. 27, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

*In the Southern Division of the District Court of the  
United States, for the Northern District of Cali-  
fornia, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**Affidavit of Service of Demurrer.**

State of California,

City and County of San Francisco,—ss.

Arthur W. Jonas, being duly sworn, deposes and says: That he is a naturalized citizen of the United States, over the age of twenty-one years, and is not a party to or in anywise interested in the above-entitled action:

That Thomas R. Shepard is the attorney of record for the plaintiffs in said action, and that his office is at number 534 New York Building, Seattle, Washington, and that he has no office in the city and county of San Francisco, State of California. That on the 21st day of December, 1916, this affiant duly served the annexed demurrer on Thomas R. Shepard, attorney for said plaintiff, by depositing a true copy of the annexed demurrer in the United States Postoffice at the city and county of San Francisco, State of



California, addressed to said Thomas R. Shepard, 534 New York Building, Seattle, Washington; that there is a regular communication by the United States mail from said Postoffice of depositing thereof as aforesaid to said city of Seattle, State of Washington, the place where said Thomas R. Shepard has his office.

ARTHUR W. JONAS.

Subscribed and sworn to before me this 21st day of December, 1916.

[Seal] JULIUS CALMANN,  
Notary Public, in and for the City and County of  
San Francisco, State of California. [6]

*In the Southern Division of the District Court of the  
United States, for the Northern District of Cali-  
fornia, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**(Demurrer and Affidavit of Service.)**

Now comes the defendants Alexander Levison and Lillie Levison above named, and demurs to complaint of plaintiffs herein and for grounds of demurrer specifies:

I.

That the Court has no jurisdiction of the persons of the defendants.

II.

That the Court has no jurisdiction of the subject of the action.

III.

That several causes of action have been improperly united in one and the same count and not separately stated, to wit: An alleged cause of action for conspiracy, together with an alleged cause of action for malicious prosecution.

IV.

That said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

V.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of subdivision one, section 339 of the Code of Civil Procedure of the State of [7] California, which said section of the Code of Civil Procedure of the State of California, was in full force and effect during all the times mentioned in said complaint and is still in full force and effect.

VI.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of subdivision three, section 340 of the Code of Civil Procedure of the State of California, which said section of the Code of Civil Procedure of the State of California was in full force and effect during all

the times mentioned in said complaint and is still in full force and effect.

#### VII.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California, which said section of the Code of Civil Procedure of the State of California was in full force and effect during all the times mentioned in said complaint and is still in full force and effect.

#### VIII.

That the said complaint is uncertain in this:

(a) That it does not appear nor can it be ascertained therefrom how or in what manner the said defendants or any of them wrongfully or at all contrived or combined together to injure and harass the plaintiff.

(b) That it does not appear nor can it be ascertained therefrom how or in what manner or at all the said defendants or either of them caused proceedings to be instituted against the plaintiff in the Police Court of the said city and county of San Francisco, for her arrest and prosecution by the people of the State of California, upon a charge of embezzlement of [8] certain moneys or upon any other charge.

(c) That it does not appear nor can it be ascertained therefrom how or in what manner the "arrest, imprisonment, and prosecution of the plaintiff, were by the defendants procured, done, instituted, carried on maliciously and without probable cause," the arrest and imprisonment of said defendant, but on the contrary it affirmatively appears from said com-



plaint that this action has been tried before the Superior Court of the city and county of San Francisco, State of California, a court of competent jurisdiction, and has been decided against the said plaintiffs, and that the judgment of said Superior Court of the city and county of San Francisco, State of California, was upon an appeal to the Supreme Court of the State of California, duly affirmed, and that this action has been decided and final judgment rendered therein by a court of competent jurisdiction and is *res judicata*.

## IX.

That said complaint is ambiguous for the reasons set forth in paragraph eight of this demurrer, which reasons are hereby especially referred to and made a part of this paragraph.

## X.

That said complaint is unintelligible for the reasons set forth in paragraph eight of this demurrer, which reasons are hereby especially referred to and made a part of this paragraph.

WHEREFORE, said defendants Alexander Levison and Lillie Levison pray that plaintiffs take nothing by their action, but that these defendants have and recover judgment for their costs herein.

M. H. WASCERWITZ,

Attorney for Defendants Alexander Levison and  
Lillie Levison.

The undersigned, M. H. Wascerwitz, hereby certifies and declares that the above demurrer is in his opinion well taken [9] in point of law, and is not

filed for purposes of delay, but is filed in good faith.

M. H. WASCERWITZ,

Attorney for Defendants Alexander Levison and  
Lillie Levison.

[Endorsed]: Filed Dec. 22, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

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*In the Southern Division of the District Court of the  
United States, for the Northern District of Cali-  
fornia, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**(Demurrer of Defendant National Surety Company.)**

Now comes the National Surety Company, one of  
the defendants in the above-entitled action, and de-  
murs to the complaint of plaintiffs herein on the fol-  
lowing grounds:

I.

That the said complaint does not state facts suffi-  
cient to constitute a cause of action against this de-  
fendant.

II.

That this Court has no jurisdiction of the person  
of this defendant.

III.

That this Court has no jurisdiction of the subject matter of the action.

IV.

That it appears from the face of the complaint that the plaintiffs in this action submitted themselves to the jurisdiction of the State of California, and more particularly of the Superior Court of the State of California, in and for the city and county of San Francisco, and elected to use that forum as a course of relief for the alleged damages herein complained of and said plaintiffs thereby waived their rights to appeal to the jurisdiction of this court. [11]

V.

That the alleged cause of action is barred by the provisions of the Code of Civil Procedure with reference to the limitation of actions, to wit: Chapter III of Title II of Part II of the Code of Civil Procedure of the State of California, which was in full force and effect at the present time and at all times mentioned in said action.

VI.

That the alleged cause of action set forth in plaintiffs' complaint is barred by the provisions of section 340 of the Code of Civil Procedure, of the State of California, more particularly including (without intending to exclude any other section), subdivision 3 of said section, and that said section 3 is in full force and effect at the present time and that said subdivision 3 was in full force and effect at all times mentioned in said complaint, and provides that an action for false imprisonment or for injury to one

caused by the wrongful act or neglect of another must be commenced within one year after the alleged injury.

## VII.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of subdivision one, section 339 of the Code of Civil Procedure of the State of California, which said section of the Code of Civil Procedure of the State of California was in full force and effect during all the times mentioned in said complaint and is still in full force and effect.

## VIII.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California, which said section of the Code of Civil Procedure of the State of California, was in full force and effect during all the times mentioned in said [12] complaint and is still in full force and effect.

## IX.

That the said complaint is uncertain in this:

(a) That it is alleged in paragraph IV thereof that the defendants, wrongfully contriving and combining together to injure and harass the plaintiff, and unlawfully to coerce her into paying said moneys caused certain proceedings to be instituted against plaintiff and it cannot be determined therefrom how or in what manner this defendant combined with the other defendants or how or in what

manner this defendant would be benefited by forcing the said plaintiff to pay moneys to Alexander Levison.

(b) It is further alleged in said paragraph IV that I. W. Bernstein "at the instance and under the direction of each and all of his codefendants appeared," and it cannot be determined therefrom how or in what manner this defendant participated in the action of I. W. Bernstein or how or in what manner this defendant exercised any direction over the said Bernstein.

(c) It is alleged in said complaint that certain proceedings were instituted against "the plaintiff" and it cannot be determined therefrom which of the plaintiffs herein was the subject of said action.

(d) It is further alleged that a police officer arrested this plaintiff and it cannot be determined therefrom which of said plaintiffs was arrested.

(e) It is alleged in paragraph VI that certain acts were done maliciously and it cannot be determined therefrom in what manner any malice was shown by this defendant or wherein any act was performed maliciously by this defendant.

(f) It is alleged in said paragraph VI that the certain arrest was without probable cause and it cannot be ascertained therefrom what cause is referred to nor on what subject the said action was without probable cause. [13]

(g) It is alleged in paragraph IX of said complaint that the pendency of a certain former action therein referred to, to wit, a suit for the same cause of action herein stated commenced on July 21, 1909,



in the Superior Court of the State of California, against these defendants prevented the plaintiffs from bringing this action in this court, and it cannot be ascertained therefrom how or in what manner the said action prevented plaintiffs, nor how or in what manner plaintiffs or either of them were prevented from maintaining this action in this court in case they saw fit to dismiss the said action in the State court.

X.

That the said complaint is ambiguous for the reasons set forth for it being uncertain, and in addition thereto because it is alleged in paragraph VI that the prosecution of this plaintiff was carried on maliciously and without probable cause, and in paragraph VIII that a court having jurisdiction of the subject matter after trial, granted a motion for nonsuit and entered a judgment of dismissal, thereby showing probable cause so great as to convince a court after trial that the action complained of was not brought with malice.

XI.

That said complaint is unintelligible for the same reasons as those herein set forth as being uncertain.

WHEREFORE, this defendant prays that it be hence dismissed with its costs of suit herein.

HELLER, POWERS & EHRMAN,

Attorneys for Plaintiff. [14]

CERTIFICATE OF COUNSEL.

The undersigned, counsel for defendants, certify that the above and foregoing demurrer is not filed

for delay and in the opinion of the undersigned is well taken in point of law.

Dated: December 22d, 1916.

HELLER, POWERS & EHRMAN,  
FRANK H. POWERS,

Attorneys for Defendant, National Surety Company.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

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At a stated term, to wit, the November term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Saturday, the 27th day of January, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 16,024.

EMMA C. LEE et al.

vs.

I. W. BERNSTEIN et al.

**(Order Sustaining Defendants' Demurrers.)**

Defendants' demurrers heretofore submitted being now fully considered and the Court having filed its memorandum opinion, it is ordered that said demurrers be and the same are hereby sustained. [16]

*In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.*

No. 16,024.

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

### **Judgment of Dismissal.**

The Court having upon motion on behalf of the attorneys for the defendants, and it appearing to the Court that plaintiffs have failed to file an amended complaint herein within the time prescribed by the Rules of this Court after sustaining the demurrer to the complaint; ordered that this cause be dismissed and that judgment be entered herein accordingly:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiffs take nothing by this action and that defendants go hereof without day, and that said defendants do have and recover of and from said plaintiffs their costs herein expended taxed at \$—.



Judgment entered February 14, 1917.

WALTER B. MALING,  
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,  
Clerk.

[Endorsed]: Filed Feb. 14, 1917. Walter B. Maling, Clerk. [17]

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*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 16,024.

EMMA C. LEE et al.  
vs.

I. W. BERNSTEIN et al.

**(Clerk's Certificate to Judgment-roll.)**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 14th day of February, 1917.

[Seal] WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: Filed February 14, 1917. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

*In the Southern Division of the United States District Court, for the Northern District of California, Second Division.*

No. 16,024.

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**Opinion, Memorandum.**

THOMAS R. SHEPARD, 534 New York Building,  
Seattle, Washington, for Plaintiffs.

M. H. WASCERWITZ, San Francisco, California,  
for Defendants.

**MEMORANDUM ON DEMURRER.**

RUDKIN, District Judge.

This is an action to recover damages for malicious prosecution.

A demurrer has been interposed to the complaint on the ground, among others, that the action was not commenced within the time limited by law. The bar of the statute is admittedly a complete defense, unless the running of the statute was interrupted or tolled by the pendency of a former action between the same parties for the same cause. Sec. 355 of the Code of Civil Procedure of this State provides as

follows: "If an action is commenced within the time prescribed therefor, and a judgment thereon for the plaintiff be reversed on appeal, the plaintiff \* \* \* may commence a new action within one year after the reversal."

The facts relied upon to bring this case within the foregoing exception, are as follows:

The wrong complained of was committed on and immediately [19] following the 21st day of July, 1909. Within nine months thereafter, the present plaintiffs commenced an action in one of the courts of this State to recover damages therefor. The parties to that action were the same and the cause of action was the same. That action was brought on for trial on the 9th day of October, 1911, and resulted in a judgment of nonsuit. From that judgment the plaintiffs appealed to the Supreme Court of the State where the judgment was affirmed on the 26th day of July, 1916. The present action was commenced within one year thereafter.

The statute in question is too plain and too free from ambiguity to admit of construction and it seems manifest to me that the foregoing facts do not bring this case within the exception. Under the statute two things must concur in order to interrupt or toll the running of the statute; first, there must be a judgment for the plaintiff, and second, there must be a reversal on appeal. While here there was a judgment against the plaintiffs and an affirmance on appeal. Numerous cases have been cited from other jurisdictions holding, as claimed, that such statutes must be given an equitable construction in order that

the right to sue may not be taken away, but a review of these cases would serve no purpose. The question is one of local law and has been set at rest by the decisions of the local courts, *Fay against Costa*, 2 Cal. App. 241. In that case administration was had upon the estate of the plaintiff upon the supposition that he was dead and a decree of distribution was made. Later the plaintiff appeared on the scene and moved the Court to annul the administration proceedings and require the administrator to account for all property received by him. Citation issued, a hearing was had, and a decree entered in accordance with the prayer of the petition, annulling the probate proceedings and awarding the plaintiff judgment against the administrator for the sum of [20] \$1518.68 and costs. An appeal from this judgment was dismissed for want of a proper bond, but later the Supreme Court granted a writ of review and annulled the decree of the Court below. An action was then commenced by the plaintiff to recover from the administrator the value of the property received by him and the statute of limitations was interposed as a defense. There, as here, the action was confessedly barred unless the running of the statute was tolled or interrupted by the proceedings referred to, and there, as here, the plaintiff relied on the prior proceedings to bring the case within the statutory exception. The Court ruled, however, that the action was barred. After quoting the rule laid down by the Code for its own construction, viz: "Words and phrases are construed according to the context and the approved usage of the language; but

technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar or appropriate meaning or definition," the Court held that the word "appeal" had a well-defined meaning under the laws of the State and did not include a writ of review. The construction there adopted was much narrower and far more technical than this Court is required to adopt in order to sustain the demurrer. There, there was a judgment for the plaintiff and a reversal by an Appellate Court, while here there was neither. And if the term "appeal" has a well defined meaning in law, most assuredly the terms "judgment thereon for the plaintiff" and "reversed on appeal" have a meaning equally well defined.

The petition to have the Fay case heard in the Supreme Court, after final judgment in the District Court of Appeals, was denied by the Supreme Court, so that the decision of the District Court must be deemed to have the approval of the highest Court in the State.

It was suggested in the brief that the statute did not run [21] in any event because one of the plaintiffs, a married woman, was under disability; but I do not understand that coverture is a disability under the laws of this State. It may be that the husband is a necessary party plaintiff to certain actions brought by the wife, and he may refuse to join therein, but even so, the wife is in no worse plight than any other plaintiff who holds a cause of action



jointly with another who refuses to join. The law affords an ample remedy in such cases.

The demurrer is sustained.

[Endorsed]: Filed Jany. 27, 1917. Walter B. Maling, Clerk. [22]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants in Error.

**Complaint and Petition for Writ of Error.**

To the Honorable the Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit.

The complaint and petition of Emma C. Lee and H. Lee, her husband, who reside in the city of Seattle in the county of King, in the State of Washington, and in the Northern Division of the Western District of Washington, respectfully alleges and shows unto your Honors as follows:

1. Heretofore, and on or about the 8th day of December, 1916, an action at law was begun in the District Court of the United States for the Northern District of California, Second Division, by your petitioners, Emma C. Lee and H. Lee, her husband, plaintiffs, citizens of the State of Washington,

against I. W. Bernstein, Alexander Levison, Lillie Levison, Mary A. Ostroski, and National Surety Company, a corporation, defendants, citizens of the State of California, to recover of said defendants, joint tort-feasors, damages in the sum of twenty-five thousand dollars (\$25,000), for a false arrest and malicious prosecution of said plaintiff Emma C. Lee, one of your petitioners, as is fully set forth and alleged in their said complaint in said action, on said date filed in said District Court.

2. Said defendants Alexander Levison and Lillie Levison, being served with a summons in said action, thereupon appeared therein by M. H. Wascerwitz, their attorney, and interposed a demurrer to said complaint upon sundry grounds—among others, in [23] substance, that said complaint did not state facts sufficient to constitute a cause of action against said defendants, and that it appeared on the face of said complaint that the alleged cause of action therein set forth was barred by the statutes of limitations of the State of California. And said defendant, National Surety Company, a corporation, being served with a summons in said action, thereupon appeared therein by Heller, Powers & Ehrman, its attorneys, and interposed a demurrer to said complaint upon sundry grounds—among others, in substance, that said complaint did not state facts sufficient to constitute a cause of action against said defendant, and that it appeared on the face of said complaint that the alleged cause of action therein set forth was barred by the statutes of limitations of the State of California. None of the other defendants in the

title of said action were served with summons therein or have appeared at all therein.

3. Thereupon said demurrers were duly brought to a hearing before said District Court at the same time, to wit, on or about the 17th day of January, 1917, and were then heard by said court and taken under advisement by the Honorable F. H. Rudkin, the District Judge then sitting in said court; and thereafter, on the 27th day of January, 1917, said District Judge in open court pronounced and filed his opinion and decision in writing, whereby he sustained said demurrers, and each of them, to said complaint, upon the sole ground that the cause of action set forth in said complaint was barred, as appeared on the face of said complaint, by the statutes of limitations of the State of California; and the plaintiffs not amending their said complaint, but standing on the same as originally filed, said District Court thereafter, on the 14th day of February, 1917, rendered and entered its final judgment dismissing said action, which is of record therein.

3. Your petitioners claim and allege that said District Court erred in sustaining said demurrers to said complaint, and [24] each of them, and in rendering judgment thereon dismissing said action, for the reason that it appears on the face of said complaint that said action was and is not barred by any statute of limitations of the State of California, because (1) said statutes were tolled and the running thereof against the plaintiffs' said cause of action was suspended by the pendency of a certain other action of said plaintiffs against said defendants based



upon the same cause of action, in the State courts of the State of California, not finally decided and terminated until within less than one year next prior to the beginning of said action in said District Court, and not finally disposed of on the merits so as to bar another action between the same parties based on the same cause of action, and (2) said statutes have never begun to run by reason of the coverture and consequent disability of the plaintiff, Emma C. Lee, one of your petitioners, who was the person subjected to the false arrest and malicious prosecution alleged in said complaint; all whereof is more particularly set forth in and appears by your petitioners' accompanying assignment of errors filed herewith, and to which they respectfully refer.

WHEREFORE, your petitioners respectfully pray that a writ of error issue from this Honorable Court to said District Court, commanding it to send up to this court its record in said action, in order that said errors may be by this court examined and corrected; and they herewith tender for the approval of a Judge of this court a bond with surety for the costs of this proceeding, together with the assignment of errors aforesaid.

Dated the 10th day of August, 1917.

THOMAS R. SHEPARD,  
Attorney for Plaintiffs in Error,  
Petitioners. [25]

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants in Error.

**Assignment of Errors.**

And now, on this 10th day of August, 1917, come Emma C. Lee and H. Lee, her husband, the plaintiffs in the above-entitled action in the court below, and plaintiffs in error in the above-named court, and make and file this, their assignment of errors, accompanying their complaint and petition for a writ of error this day filed in the above-entitled court, as follows, to wit:

1. The court below, to wit, the District Court of the United States for the Northern District of California, Second Division, erred in sustaining the demurrer of the defendants, Alexander Levison and Lillie Levison, to the plaintiffs' complaint, upon the sole ground that the cause of action set forth in said complaint was barred, as appeared on the face of said complaint, by the statutes of limitations of the State of California, because (1) said statutes were tolled and the running thereof against the plaintiffs' said cause of action was suspended by the pendency of a

certain other action of said plaintiffs against said defendants based upon the same cause of action, in the State courts of the State of California, not finally decided and terminated until within less than one year next prior to the beginning of said action in said District Court, and not finally disposed of on the merits, so as to bar another action between the same parties [26] based on the same cause of action, and (2) said statutes have never begun to run by reason of the coverture and consequent disability of the plaintiff Emma C. Lee, who was the person subjected to the false arrest and malicious prosecution alleged in said complaint—all whereof appears upon the face of said complaint.

2. Said District Court erred in sustaining the demurrer of the defendant National Surety Company, a corporation, to the plaintiffs' complaint, upon the sole ground that the cause of action set forth in said complaint was barred, as appeared on the face of said complaint, by the statutes of limitations of the State of California, because (1) said statutes were tolled and the running thereof against the plaintiffs' said cause of action was suspended by the pendency of a certain other action of said plaintiffs against said defendants based upon the same cause of action, in the State courts of the State of California, not finally decided and terminated until within less than one year next prior to the beginning of said action in said District Court, and not finally disposed of on the merits so as to bar another action between the same parties based on the same cause of action, and (2) said statutes have never begun to run by reason of the

coverture and consequent disability of the plaintiff Emma C. Lee, who was the person subjected to the false arrest and malicious prosecution alleged in said complaint—all whereof appears upon the face of said complaint.

3. Said District Court erred in rendering its judgment, in favor of said defendants Alexander Levison and Lillie Levison, dismissing said action in pursuance of its said decision and order sustaining said defendants' demurrer to said complaint, for the reason that said demurrer was erroneously sustained, as is claimed and set forth in the first assignment of error hereinabove. [27]

4. Said District Court erred in rendering its said judgment, in favor of said defendant National Surety Company, a corporation, dismissing said action in pursuance of its said decision and order sustaining said defendant's demurrer to said complaint, for the reason that said demurrer was erroneously sustained, as is claimed and set forth in the second assignment of error hereinabove.

WHEREFORE these plaintiffs in error pray for a reversal of said judgment of dismissal of said action, and that this cause be thereupon remanded to said District Court for further proceedings therein in accordance with law and with the opinion and decision of said United States Circuit Court of Appeals for the Ninth Circuit upon the hearing of said writ of error; and for their costs of said proceeding in error.

Dated the 10th day of August, 1917.

THOMAS R. SHEPARD,  
Attorney for Plaintiffs in Error.

[Endorsed]: Filed Aug. 10, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

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*United States Circuit Court of Appeals for the Ninth  
Circuit.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,  
vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,  
Defendant in Error.

**Bond on Writ of Error.**

Know All Men by These Presents, that we, Emma C. Lee and H. Lee, her husband, of Seattle, King County, Washington, as principals, by Thomas R. Shepard, their attorney of record in the below-mentioned cause, hereunto duly authorized, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Alexander Levison and Lillie Levison, and the National Surety Company, a corporation, and unto each of said obligees jointly or severally as they or any of them may be or become entitled to any benefit of this bond, in the sum of two hundred dollars (\$200), lawful money of the United States of America, for the payment of which sum,



well and truly to be made, we bind ourselves and our respective heirs, representatives and successors, jointly and severally, firmly by these presents. Sealed with our seals and dated this 10th day of August, 1917.

WHEREAS, the above-named Emma C. Lee and H. Lee, her husband, are about to apply for and prosecute a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Northern District of California, Second Division, to reverse the judgment rendered and entered by said District Court on the 14th day of February, 1917, in a certain cause then pending in said District Court, wherein [29] said Emma C. Lee and H. Lee, her husband, were plaintiffs, and I. W. Bernstein, Alexander Levison, Lillie Levison, Mary A. Ostroski, and National Surety Company, a corporation, were defendants;

Now, therefore, the condition of this obligation is such, that if the above-named principal obligors Emma C. Lee and H. Lee, her husband, shall prosecute said writ of error to effect, and answer all costs if they fail to make their said plea good, all without fraud or delay, then this obligation shall be void; else, valid.

EMMA C. LEE. [Seal]

H. LEE, [Seal]

Plaintiffs in Error, and Principal Obligors.

By THOMAS R. SHEPARD,

Their Attorney.

[Corporate Seal]

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, [Seal]

By C. K. BENNETT,  
Attorney in Fact.

By ANTHONY PANELLA, Agent.  
Surety.

The form of the within bond and the sufficiency of the surety thereon is hereby approved, this 10th day of Aug., 1917.

WM. W. MORROW,  
United States Circuit Judge and Judge of the U. S.  
Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Aug. 10, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

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*In the District Court of the United States for the  
Northern District of California, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**Praeipice for Transcript of Record.**

To the Clerk of the Above-named Court:

You will please prepare, certify and transmit to and file with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on or before the return day of the

writ of error from that court this day filed in your office to review the judgment of the above-named District Court in the above-entitled cause, a transcript on appeal of the record and judgment in the above-entitled cause, consisting of copies of the complaint, summons and returns of service thereof, demurrers to complaint, opinion and decision of the Court sustaining said demurrers, order entered in pursuance of said decision, judgment of dismissal of said action entered on February 14th, 1917, and writ of error and papers accompanying the same filed in your office.

Dated August 10th, 1917.

THOMAS R. SHEPARD,  
Attorney for Plaintiffs, Plaintiffs in Error.

[Endorsed]: Filed Aug. 10, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

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*In the Southern Division of the District Court of the  
United States for the Northern District of Cali-  
fornia, Second Division.*

No. 16,024.

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERTSTEIN et al.,  
Defendants.

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of  
the United States of America, in and for the North-



ern District of California, do hereby certify the foregoing thirty-one (31) pages, numbered from 1 to 31, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$12.60; that said amount was paid by the attorney for plaintiffs, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of August, A. D. 1917.

[Seal]                      WALTER B. MALING,  
Clerk U. S. District Court, in and for the Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk. [32]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants in Error.

**Writ of Error.**

The President of the United States of America, to  
the Judges of the District Court of the United  
States for the Northern District of California,  
Second Division, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment of a plea which is in  
the said District Court, before you, or some of you,  
between Emma C. Lee and H. Lee, her husband,  
plaintiffs, and I. W. Bernstein, Alexander Levison,  
Lillie Levison, Mary A. Ostroski, and National  
Surety Company, a corporation, defendants, a mani-  
fest error hath happened, to the great damage of the  
said Emma C. Lee and H. Lee her husband, plain-  
tiffs, as is said and appears by their complaint and  
petition for this writ of error:

We, being willing that such error, if any hath been,  
should be duly corrected, and full and speedy justice  
done to the parties aforesaid in this behalf, do com-  
mand you, if judgment be therein given, that then,  
under your seal, distinctly and openly you send the  
record and proceedings aforesaid, with all things  
concerning the same, to the Judges of the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit, at the courtrooms of said court, in the city of  
San Francisco, California, so that you have the same  
at the said place, before the Judges aforesaid on the  
10th day of September next, that the record and pro-  
ceedings aforesaid being inspected the said Judges  
of the said Circuit Court of Appeals may further  
cause to be done therein, to correct that error, what

of right and according to the law and custom of the [33] United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 10th day of August, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-second.

[Seal] F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

The foregoing writ is hereby allowed, this 10th day of August, 1917.

WM. W. MORROW,  
Judge of the United States Circuit Court of Appeals  
for the Ninth Circuit. [34]

[Endorsed]: 16,024. In the United States District Court for the Northern District of California, Second Division. Emma C. Lee, et al., Plffs. in Error, vs. I. W. Bernstein et al., Defendants in Error. Writ of Error. Filed Aug. 11, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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**Return to Writ of Error.**

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of

Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [35]

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**Citation on Writ of Error.**

To Alexander Levison, Lillie Levison, and M. H. Wascerwitz, Their Attorneys, and to National Surety Company, a Corporation, and Heller, Powers & Ehrman, Its Attorneys, Greeting:

You and each of you, said Alexander Levison, Lillie Levison, and National Surety Company, a corporation, are hereby cited and admonished to be and appear at the United States Circuit Court for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to wit, on or before the 10th day of September next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Northern District of California, Second Division, at San Francisco, California (and a copy of which writ for each of you is lodged in said clerk's office), wherein Emma C. Lee and H. Lee, her husband, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered and entered against said plaintiffs in error as in said writ of

error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM W. MORROW, one of the Judges of said United States Circuit Court of Appeals for the Ninth Circuit, this 10th day of August, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-second.

WM. W. MORROW,  
Judge of the United States Circuit Court of Appeals  
for the Ninth Circuit.

Receipt of the foregoing citation, and of the writ of error therein mentioned, on this 10th day of August, 1917, is acknowledged.

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Attorney for Alexander Levison and Lillie Levison.  
HELLER, POWERS & EHRMAN,  
Attorneys for National Surety Company. [36]

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*In the United States District Court for the Northern  
District of California, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON and NATIONAL SUR-  
ETY COMPANY, a Corporation,  
Defendants in Error.



**Affidavit of Service of Citation and Writ of Error.**

United States of America,

State of California,

City and County of San Francisco,—ss.

W. Rea Marshall, of the city and county of San Francisco, being first duly sworn, says that he is a male citizen of the United States, over the age of twenty-one years and not a party to the above-entitled action;

That at 2:30 o'clock P. M. on the 10th day of August, 1917, he personally served the citation and writ of error in the above-entitled action attached to this affidavit upon M. H. Wascerwitz, the attorney of record for Alexander Levison and Lillie Levison in the above-entitled action, by showing the original of said citation and writ of error to the said M. H. Wascerwitz at the law office of said M. H. Wascerwitz at Room 809, Claus Spreckels Building, in the city and county of San Francisco, and delivering to the said M. H. Wascerwitz personally a true copy thereof, the said M. H. Wascerwitz, the attorney of record for the said Alexander Levison and Lillie Levison declining to accept [37] service on said original.

W. REA MARSHALL.

Subscribed and sworn to before me, this 11th day of August, 1917.

[Seal]

C. B. SESSONS,

Notary Public in and for the City and County of San Francisco, State of California. [38]

[Endorsed]: 16,024. U. S. District Court for the Northern District of California, 2d Division. Emma C. Lee, et al., Plaintiffs in Error, vs. I. W. Bernstein et al., Defts. in Error. Citation on Writ of Error. Filed Aug. 11, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 3033. United States Circuit Court of Appeals for the Ninth Circuit. Emma C. Lee and H. Lee, Her Husband, Plaintiffs in Error, vs. Alexander Levison, Lillie Levison and National Surety Company, a Corporation, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed August 21, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

